IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21806

STEVEN MICHAEL OSHATZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

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We will consider the Argument of Appellee, which starts on page 6 of its brief:

A. The Administrative Processing Point

1. Appellee states that "Appellant, in his Opening Brief ignores this point and its implications [that Appellant filed his conscientious objection claim for the first time after the order to report for induction]."

This "point and its implications" arise only if they are asserted by the appellee as a bar to a consideration of the

merits of appellant's claim. The appellee has now chosen to raise this bar and to avoid a head-on clash with our no-basis-in-fact point.

Our reply to Appellee is: it has been held, and is good law, that a registrant may raise such a claim for the first time after an order to report for induction and that an arbitrary refusal to reopen the classification, a true "re-opening", one that gives the registrant an administrative appellate opportunity, is to be labelled "arbitrary" by the courts.

Gearey v. *United States,* 2 Cir., 1966, 368 F. 2d 144;
Miller v. *United States,* 9 Cir., 1967, 388 F. 2d 973;
Hamilton v. *Commanding Officer,* 9 Cir., 1964, 328 F. 2d 799;
MacMurray v. *United States,* 9 Cir., 1964, 230 F. 2d 928;
U. S. v. *Sobczak,* N.D. Ga., 1966, 264 F. Supp. 752.

There have been many district courts that have followed this rationale, namely, that a non-frivolous claim of conscientious objection, made late, should have the standard administrative opportunities.

U. S. v. *Longworth,* S.D. Ohio, 1967, 269 F. Supp. 971, 973.

One of the latest, and one on the extreme of the spectrum (that is, a claim first made after the refusal to submit to induction), is *U. S. A.* v. *Federspiel, Jr.,* N.D. Ohio, No. CR 67-240. We have an 18 page Transcript of Oral Opinion of the Honorable Thomas D. Lambros, Judge of said Court, on Monday, February 19, 1968, at 2:00 o'clock P.M. Three excerpts give the facts and the reasoning:

"The draft board thereafter, on November 4, 1965, had a board meeting; and as a result of the board meeting, the following communication was sent by the clerk of the draft board to the State Director, which reads as follows and that is Item 65 in the Selective Service file:

Dear Sir:

At the local board meeting held on 4 November, 1965, the board members reviewed the file of the above named registrant. SSS Form No. 150, Special Form for Conscientious Objectors was reviewed by the local board, and the registrant's classification was not reopened. The local board did not consider this a bona fide conscientious objection claim. The board members also noted that the registrant did not request SSS Form No. 150 until after he had refused to submit to induction.

By Direction of the Local Board, Norma L. Nead, Clerk." [p. 5]

B. "This could all have been avoided if the draft board in this case had done its job and not passed a snap judgment; had they been advised under the circumstances a prima facie case was made out in this case and afforded him a hearing.

There is a right way to do things and a wrong way to do them. In this case, the draft board did it wrong." [p. 16]

C. "A draft board should be advised in these cases, that notwithstanding the fact that they are very impatient with conscientious objector claims, and notwithstanding the fact that there are thousands of conscientious objector claims throughout this country,

nonetheless, because of the unique ingredients and components of such a claim, which involves a state-of mind attitude of individuals, a judgment should not be passed merely by reviewing a Form 150. There should be a confrontation review and analysis—a time-consuming process. That is part of the job.

In this case, the draft board did not do its job. It took the short route, the short cut; it did not comply with the regulations.

The Court finds that the Defendant was thus technically denied due process. The Court finds that the failure to reopen and reconsider this case was improper." [pp. 17-18]

The question concerning the time of "final crystallization" of appellant's claim is one to be determined by the record. The entries in the government's exhibit concerning his Appearance Before Local Board (the board's version, pages 64-66) and his testimony, reporter's transcript, page 23, shows, we contend, that it was after the order to report for induction. This, giving weight to *Gearey* and the other cases cited above, would require the reopening with the attendant administrative appellate opportunity.

2. Appellee next argues (p. 7) "What the local board did in its interview of the appellant, was to see whether any 'change' resulted from 'circumstances over which the registrant had no control.'"

We say: what the local board did was to justify its refusal. Our Opening Brief argues this. See what one writer (not this one) said in 54 California Law Review 2123 (1966) at 2165:

"Fourth, the informality which surrounds local board proceedings is supposed to give a registrant the opportunity for a full and frank discussion of his claim for deferment or exemption with board members. But some board members have a wholly different concept of the function of the personal appearance. They view it more as an opportunity for them to justify their denial of an exemption or deferment to a registrant than as an opportunity for the registrant to convince the board he deserves a deferment or exemption. Because these board members do not attend the personal appearance for the purpose of listening to the registrant's story and perhaps being persuaded by it, they very seldom change a classification as a result of the registrant's appearance."

B. "New" Appellate Points

Appellee seeks to bar this point from consideration on appeal on the declared basis, "Appellant cannot raise on appeal a point not raised in the trial court" [p. 9].

1. The Motion for Judgment of Acquittal [TR 4-5] reads:

"4. One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than $10,000.00 or both. The regulation is couched in mandatory, not discretionary, language."

Appellee points to the fact that the Motion was filed two days after the trial. We comment:

(a) The Reporter's Transcript reads:

"MR. TIETZ: If the court please, this morning when I was in court I had a typewritten motion for judgment of acquittal, six copies, and I went back to the office and took the papers out of my file for various discussions and I do not find my motion for judgment of acquittal which I have always in every case filed.

THE COURT: Well, it may be deemed to have been filed. You can supply a copy of it later.

MR. TIETZ: Thank you." [p. 9]

(b) The ground of the motion that is in question (No. 4, in this case) is identical to that in other cases *before this trial judge,* and known to this Court. See *Dugdale* v. *U. S.,* 9 Cir., No. 21789, RT 22 (No. 4); *Edwards* v. *U. S.,* 9 Cir., No. 21879, RT 22 (No. 10).

2. Additionally, this Court has not been loath to consider, and rule on, patent error:

Chernekoff v. *U. S.,* 9 Cir., 1955, 219 F. 2d 721.

It was said in argument that this omission is in consonance with the practice in Los Angeles County. If that be so, we have serious doubt as to the validity of such a practice by the local boards. Suffice it here to observe that this deviation from the regulation was not affected by the action of the appeal board. *Franks* v. *United States,* 9 Cir., 1954, 216 F. 2d 266. [724]

Likewise in the course of argument it was represented and unchallenged that the derogatory information in the file as to appellant's religious sincerity concerns

a single conviction for drunkenness and a later one for speeding. To be a good church member does not necessarily entail being a saint. A mortal may occasionally weaken and still remain loyal to the tenets of his faith. A conscientious objector is not to be considered an outcast susceptible of being convicted of a felony by any stray scintilla of evidence indicating sporadic deviation from the principles and approved practices of his religion. We are all children of Eve. [724]

Reversal is also required because the appellant never refused to be inducted into the Armed Forces in the manner required by the law in order to warrant prosecution. [724]

C. "There Was No Prejudice to Appellant"

Appellee argues that there was no prejudice to appellant. [p. 9] In our Opening Brief we quoted the opinion of Judge Wm. Mathes, in *U. S.* v. *Feuer*, No. 25778, S.D. Calif., that it is akin to entrapment.

We argue that he was deprived of a procedural opportunity to be disqualified comparable to that of a physical examination or the "warning" of penalty for refusal, or the "second chance" to refuse. The odds of rejection may be slim but he was entitled to the rejection opportunity.

We argue this deprivation approaches the loss suffered by one who is short circuited from the opportunities of a hearing and of an administrative appeal. A final argument: a hearing given, but unfairly conducted has been roundly scored by the Supreme Court:

"Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation."

Simmons v. *U. S. A.*, (1955) 75 S.Ct. 397, 402.

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

May 17, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant